



THE UNIVERSITY *of* EDINBURGH

Edinburgh Research Explorer

The limits of legal pluralism in the Roman Empire

Citation for published version:

Czajkowski, K 2019, 'The limits of legal pluralism in the Roman Empire', *The Journal of Legal History*, vol. 40, no. 2, pp. 110-129. <https://doi.org/10.1080/01440365.2019.1625202>

Digital Object Identifier (DOI):

[10.1080/01440365.2019.1625202](https://doi.org/10.1080/01440365.2019.1625202)

Link:

[Link to publication record in Edinburgh Research Explorer](#)

Document Version:

Peer reviewed version

Published In:

The Journal of Legal History

Publisher Rights Statement:

This is an Accepted Manuscript of an article published by Taylor & Francis in the Journal of Legal History on 6/6/2019, available online: <https://www.tandfonline.com/doi/full/10.1080/01440365.2019.1625202>.

General rights

Copyright for the publications made accessible via the Edinburgh Research Explorer is retained by the author(s) and / or other copyright owners and it is a condition of accessing these publications that users recognise and abide by the legal requirements associated with these rights.

Take down policy

The University of Edinburgh has made every reasonable effort to ensure that Edinburgh Research Explorer content complies with UK legislation. If you believe that the public display of this file breaches copyright please contact openaccess@ed.ac.uk providing details, and we will remove access to the work immediately and investigate your claim.



The Limits of Legal Pluralism in the Roman Empire

Abstract

The Roman Empire was legally pluralistic. But what exactly does this entail in concrete terms? With the growth in historical studies of legal pluralism in the Roman empire, some significant differences in approach have emerged. This paper tests and clarifies some of the limits in the current “legal pluralism” conceptual landscape, focussing on disputes and dispute resolution. It is argued that a clearer distinction should be drawn between “normative” and “jurisdictional” pluralism, though both approaches still raise certain conceptual problems. The place of disputes within the family within this wider institutional picture is then taken as a case study in the final part of the paper, and it is suggested that while family disputes can evidence “legal pluralism” in the “norms” sense, there is less to suggest that there were a multitude of officially sanctioned legal fora available for resolving family disputes. As a result, many went beyond the law. This has wider implications for the study of legal pluralism in antiquity and the problem of integrating Alternative Dispute Resolution (ADR) into the pluralistic picture.

I. Introduction

As a result of the *Constitutio Antoniniana*, all free inhabitants of the Roman empire became Roman citizens and thus subject to Roman civil law.¹ For many years, this was thought to be the end of local law within the empire: as Ps-Menander later put it, city laws were no longer a suitable subject for praise because everyone used the ‘universal laws of the Romans’.² Roman law was now supreme and reigned in beautiful isolation, subsuming all other legal orderings under its wings.³

This is of course a far too unitary view, and has always been tempered with greater nuance. The extent and immediacy of the effects of the *Constitutio Antoniniana* have been debated, and the co-existence of local legal orderings alongside the imperial legal regime has widely been acknowledged.⁴ Recently,

¹ Now exactly dated to 11th July 212 CE: see Peter van Minnen, ‘Three Edicts of Caracalla? A New Reading of P.Giss. 40’, 46 *Chiron* (2016), 205.

² Ps-Menander, *Treatise* I.III.364: ἀλλὰ καὶ τοῦτο τὸ μέρος διὰ τὸ τοῖς κοινῶς χρησθῆναι τῶν Ῥωμαίων νόμοις ἄχρηστον (this theme, however, is also pointless, because we use the universal laws of the Romans).

³ ‘Ein Kaiser, ein Reich, ein Recht’ to quote again the too often quoted Rudolf Sohm, *Institutionen: Geschichte und System des römischen Privatrechts*, 13th edn, Leipzig, 1908, 205.

⁴ The literature on this subject is immense: Jose Luis Alonso, ‘The Constitutio Antoniniana and the Private Legal Practice in Egypt’, in Kimberley Czajkowski and Benedikt Eckhardt, with Meret Strothmann, eds. *Law in the Roman Provinces*, Oxford, forthcoming, will be a thorough retreatment of the effect of the CA; for recent contributions on family law in particular, see Antti Arjava, ‘Paternal power in late antiquity’, 88 *The Journal of Roman Studies* (1998), 147; Antti Arjava, ‘Eine Freilassung aus der väterlichen Gewalt. CPR vi 7’, 14 *Tyche* (1999), 15; Antti Arjava, ‘Die römische Vormundschaft und das Volljährigkeitsalter in Ägypten’, 126 *Zeitschrift für Papyrologie und Epigraphik* (1999), 202; Antti Arjava, ‘The Romanization of Family Law’, in James G. Keenan, Joseph G. Manning, Uri Yiftach-Firanko, eds., *Law and Legal Practice in Egypt from Alexander to the Arab Conquest. A Selection of Papyrological Sources in Translation, with Introductions and Commentary*, Cambridge, NY, 2014, 175; in the older literature and more generally (i.e. beyond family law), Ludwig Mitteis, *Reichsrecht und Volksrecht in den östlichen Provinzen des römischen Kaiserreichs, mit Beiträgen zur Kenntnis des griechischen Rechts und der spätrömischen Rechtsentwicklung*, Leipzig, 1891 remains compulsory reading as the father of the subject (*Reichsrecht und Volksrecht*); see also of course Ernst Schönbauer ‘Reichsrecht gegen Volksrecht? Studien über die Bedeutung der Constitutio Antoniniana für die römische Rechtsentwicklung,’ 51 *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung* 51 (1931), 277, and Vincenzo

this has gone hand in hand with an emphasis on the ‘legal pluralism’ or ‘multi-legalism’ of the empire both post- and pre-212 CE, a term and indeed field of study imported from comparative law, legal anthropology and sociology that has now gained a large amount of traction in studies of law in the Roman world.⁵ Indeed, a descriptor that was once ground-breaking in turning a centralized, unitary idea of Roman (state) law on its head has now become something of the norm in describing the ancient landscape.⁶ And yet there is perhaps less consensus on what this constitutes than one might think, and as such what exactly is meant when we state that the Roman empire was ‘legally pluralistic’ bears testing in more detail. Despite the growing ubiquity of the label, there are clear limits to the extent of the existence of legal pluralism in antiquity both in conceptual terms and in what the ancient evidence actually attests.

A full survey of the practice of law in the empire is beyond the bounds of the current article, but this paper will test and clarify some of the limits in the current conceptual and ancient landscape. A brief sketch of two of the more influential approaches to Roman legal pluralism will be given below in order to demonstrate that they represent somewhat different conceptions of what constitutes a pluralistic legal environment. The rest of the paper will then take a two-pronged approach to foreground the limits of the extent to which we might describe the legal situation in the early empire as pluralistic. The focus throughout is on disputes and dispute resolution. It is argued that a clearer distinction should be drawn between ‘normative’ and ‘jurisdictional’ pluralism in our conceptual framework for antiquity, though that both approaches to the subject still have certain holes. Furthermore, although there are some clear instances of both varieties in antiquity, there are also quite clear limits to the extent of officially sanctioned jurisdictional pluralism; the nature of the evidence also limits the extent to which we can assess both normative and jurisdictional pluralism in antiquity. The last section then takes this wider institutional picture and, in line with the theme of this issue, explicitly considers the place of disputes within the family. It is suggested that while family disputes can evidence ‘legal pluralism’ in the ‘norms’ sense, there is less to suggest that there were a multitude of officially sanctioned legal fora available for resolving family disputes, especially in the realm of marriage and divorce. As a result, many likely went beyond the law; while this is sometimes touched upon in the context of ‘bargaining in the shadow of the law’, we should go further and consider whether such methods of dispute resolution also constitute

Arangio-Ruiz, ‘L’application du droit romain en Égypte après la Constitution Antoninienne,’ 29 *Bulletin de l’Institut d’Égypte* (1948), 83.

⁵ See Kaius Tuori, ‘Legal Pluralism and the Roman Empires’, in John W. Cairns, and Paul J. du Plessis, eds. *Beyond Dogmatics: Law and Society in the Roman World*, Edinburgh, 2007, 39 for an overview of the developments.

⁶ Perhaps emblematic of this is that one of the recent English language-handbooks on Roman law and society includes a chapter dedicated to ‘legal pluralism’: see Paul J. Du Plessis, Kaius Tuori and Clifford Ando, *The Oxford Handbook of Roman Law and Society*, Oxford, 2016; see also Tuori, ‘Legal Pluralism’, (2007) for an overview until that date; multiple conferences have been arranged on the topic (including that from which this journal issue derived, see also that held at CNRS in 2015). The various key pieces of literature on the subject will be discussed below, but it is notable how accepted this has now become as a description of the Roman legal landscape.

a form of Alternative Dispute Resolution (ADR). A hallmark of modern studies of legal pluralism, this is markedly absent from conceptual frameworks for the Roman empire, and its exclusion may involve an implicit replication of a centralized state perspective that legal pluralism studies initially sought to avoid.

II. Legal pluralisms in the Roman empire

The Roman Empire was legally pluralist. That is to say, in any given political space, multiple bodies of law, deriving from discrete sources, and multiple institutions of dispute resolution, potentially held authority over any given issue.⁷

It is perhaps easy to forget how revolutionary this statement would once have been. Not only does Ando's formulation emphasize the fact that multiple legal traditions co-existed in the Roman empire, but it designates those that did not derive directly from the Roman state as 'legal'. Custom, vulgar law and so on have almost always been acknowledged to exist within the bounds of Rome's territorial grasp, but these are no longer – in name at least – subsumed under the umbrella of the Roman; they are allowed to co-exist, and given the label 'law'. As a result, scholarly attention is not simply directed at finding out how Roman law accommodated (or was degenerated by) native legal regimes.

Now, however, such a statement finds its way into a handbook on Roman law and society. The description of the empire as legally pluralist is a given and, except in some minority circles, would probably raise few objections, particularly pre-212 CE. But understandings of the meaning of this term, and the nature of what it describes in antiquity, remain rather more diverse. Two of the most influential approaches to this subject (exemplified by Ando and Humfress) will briefly be outlined here in order to reflect on what exactly is entailed in our description of the empire as legally pluralistic, but also what is missed.

To begin with Ando: his position is that 'Ancient empires were pluralist as a matter of form,'⁸ and the legal sphere is no exception to this. As the above quotation encapsulates, there were multiple authorities, bodies of law and institutions of dispute resolution within the political entities of empire: this is essentially a description of (Ando's conception of) the meaning of legal pluralism, and it is a wide-ranging one, taking into account pluralism in legal sources, regulations and fora. However, Ando's focus thereafter is more normally on a distinctly Roman viewpoint, concentrating for the most part on Roman courts and on how they dealt with the foreign subjects and non-Roman laws that came before them.⁹ This takes as its centre what might be termed state legal pluralism: the recognition by the state

⁷ Clifford Ando, 'Legal Pluralism in Practice', in du Plessis, Tuori, and Ando, *Handbook*, 283.

⁸ Clifford Ando, 'Pluralism and Empire: From Rome to Robert Cover', *Critical Analysis of Law and New Interdisciplinarity* 1:1 (2014).

⁹ Ando, 'Legal Pluralism in Practice'.

of ‘other’ law for (more or less) limited purposes.¹⁰ While this is sometimes labelled ‘weak’ legal pluralism,¹¹ the designation undermines its significance: it is a vital area of study for understanding the ideology and practice of the Roman state and the officials who represented it.

Humfress shares some assumptions in her starting point with Ando, particularly on the pluralistic nature of empire and legal pluralism as the default in the earlier period:

To move from early to late Empire is thus to shift – in the broadest terms – from a Roman hegemony in which complex interactions between multiple legalities are taken as fact, to a late Roman hegemony in which emperors and centralised bureaucrats laid down the law for their provincial subjects.¹²

She of course then tackles head on the latter assumption, arguing that ‘multiple legalities’ persisted into the late Empire.¹³ But her approach to the subject then differs quite considerably from Ando’s, in that she typically takes a more ‘bottom-up’ approach, considering how litigants themselves negotiated the possible options available to them, most notably in a case study of ‘Forum Shopping’.¹⁴ The approach is explicitly less statist,¹⁵ explicitly flipped to the local, social, even individual viewpoints.¹⁶ And here, implicitly at least, the quintessential mark of plurality is the existence of multiple fora from which litigants may choose (to a greater or lesser extent): the focus is not on the Roman court *per se*. Humfress labels this an ‘institutional’ approach to legal pluralism,¹⁷ and the emphasis on what constitutes plurality, and thus what we take as our concentration of study, differs significantly in concentration from Ando.

The approaches are not mutually exclusive, and indeed we need both: to what extent did the Roman state allow for multiple legalities – either in the sense of legal norms or legal fora – and how, why and to what extent were provincial subjects able to use them? But in isolation the two approaches – aside

¹⁰ See William Twining, ‘Normative and Legal Pluralism: A Global Perspective’, 20 *Duke Journal of Comparative & International Law* (2010), 473 at 490). Ando’s wider definition also perhaps might be labelled legal polycentricity (i.e. the use of multiple sources of law within the state legal system), though his greater focus is on the former aspect.

¹¹ John Griffiths, ‘What Is Legal Pluralism?’ 24 *Journal of Legal Pluralism* (1986), 1.

¹² Caroline Humfress, ‘Thinking Through Legal Pluralism: ‘Forum Shopping’ in the Later Roman Empire’, in: Jeroen Duindam, Jill Harries, Caroline Humfress, and Nimrod Hurvitz, N. eds. *Law and Empire. Ideas, Practice, Empires*, Leiden, 2013, 225.

¹³ While Humfress is often concerned with the post-212 CE world, her work does concern (and have further implications for) the situation before the *Constitutio Antoniniana*.

¹⁴ Humfress, ‘Thinking Through Legal Pluralism’, especially at 233, ‘Roman legal institutions as social constructions ... focus on local institutionalised contexts and on the point of view of the litigants.’

¹⁵ Though the alternative fora that Humfress, ‘Thinking Through Legal Pluralism’, discusses are those that are recognized in some way by the Roman state: there is a gap here, that will be discussed below, for ‘non-official’ or ‘non-recognized’ methods of dispute resolution and how these in turn may act to preserve (or not) a pluralistic situation.

¹⁶ For this approach to one particular provincial group, see Kimberley Czajkowski, *Localized Law: The Babatha and Salome Komaise Archives*, Oxford, 2017.

¹⁷ We might perhaps label this ‘jurisdictional pluralism’.

from a starting assumption of multiplicity in the early to high empire – take as their core different meaningful criteria for designating a situation legally pluralistic. Ando may still have legal pluralism without a multiplicity of jurisdictions;¹⁸ Humfress’ ‘institutional’ approach leaves this less clear.

III. The Extent of Legal Pluralism within Roman Courts

That Roman judges were willing to take into account, consider and even consistently apply non-Roman law – both before the *Constitutio Antoniniana* and after – is now beyond question.¹⁹ Our best documented province in this matter, Egypt, makes this abundantly clear: in fact, judging in accordance with what is presented as the indigenous legal ordering seems to be the norm from which there were exceptions, rather than *vice versa*. The survival of sibling marriage, for example, – completely contrary to all Roman norms – encapsulates the strength of this principle:²⁰ in short, Roman judges consistently upheld peregrine norms in status, family, and inheritance.²¹

Objections can be made to this picture, most notably on the basis that the majority of the evidence comes from Egypt. The ‘specialness’ of this province has long been a point of debate (and in some circles is still an accepted principle). There is a rightful pushback against this,²² and almost any given province can be subject to arguments for its particularity. Other provinces are not as well documented, but the evidence we do have does not suggest that we should *a priori* assume that Roman officials behaved in a significantly different manner (to generalize), and a general acknowledgment that

¹⁸ This is not to state that jurisdictions are not mentioned in the conception but that the designation of the empire as pluralistic can stand without this part.

¹⁹ See Jose Luis Alonso, ‘The Status of Peregrine Law in Egypt: "Customary Law" and Legal Pluralism in the Roman Empire’, 43 *The Journal of Juristic Papyrology* (2013), 351 on Egypt; traces are certainly also available elsewhere even after the *Constitutio Antoniniana* (see, for example, P. Dura 126, a *sententia* dated to 235 CE, in which an ‘ἀγράφως’ division that took place ‘according to the custom of the village’ (κατὰ τὴν συνήθηθῃαν τῆς κώμης) is upheld).

²⁰ Efforts to deny the practice have largely been unconvincing. On sibling marriage, see *inter plurima alia* Paul John Frandsen, Frandsen, *Incestuous and Close-kin Marriage in Ancient Egypt and Persia: an Examination of the Evidence*, Copenhagen, 2009; Sofie Remijnsen and Willy Clarysse, ‘Incest or adoption? Brother-sister marriage in Roman Egypt revisited’, 98 *The Journal of Roman Studies* (2008), 53; Sabine Huebner, ‘“Brother-Sister” Marriage in Roman Egypt: A curiosity of Humankind or a widespread family strategy?’, 97 *The Journal of Roman Studies* (2007), 21; Silvia Bussi, ‘Mariages endogames en Egypte’, 80 *Revue Historique de Droit Français et Etranger* (2000), 1; Walter Scheidel, ‘Brother-Sister Marriage in Roman Egypt’, 29 *Journal of Biosocial Science* (1997), 361; and Keith Hopkins, ‘Brother-Sister Marriage in Roman Egypt’, 22 *Comparative Studies in Society and History* (1980), 303; Joseph Modrzejewski, ‘Die Geschwisterehe in der hellenistischen Praxis und nach römischen Recht’, 81 *Zeitschrift für Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung* (1964), 52 for an older, thorough treatment of the legal problem.

²¹ Alonso, ‘The Status of Peregrine Law’, 353.

²² Alan K. Bowman and Dominic Rathbone, ‘Cities and Administration in Roman Egypt’, 82 *Journal of Roman Studies* (1990), 107 remains an important contribution; more recently see Livia Capponi, *Augustan Egypt: The Creation of a Roman Province*, London and New York, 2005; Andrea Jördens, *Statthalterliche Verwaltung in der römischen Kaiserzeit. Studien zum praefectus Aegypti*, Stuttgart, 2009; Andrew Monson, *From the Ptolemies to the Romans: Political and Economic Change in Egypt*, Cambridge, 2012; and Dominic Rathbone, ‘The Romanity of Roman Egypt: A Faltering Consensus?’, 43 *Journal of Juristic Papyrology* 43 (2013), 73.

preserving local norms would make the business of keeping order in a vast empire an easier matter is broadly to be accepted.

But were there limits to the existence of legal pluralism under this interpretation of the term (normative pluralism)? Take the sibling marriage example. This is used to demonstrate that even when practice directly contravened Roman norms, it could persist and be upheld. Nonetheless, there are counter-examples: judges seized on precedents to overrule the ‘inhumanity’ of the law of the Egyptians that – allegedly – allowed fathers to forcibly divorce their daughters.²³ The judgments cited by Dionysia in her dispute with her father in 186 CE are the typical examples used to illustrate this,²⁴ and here indeed Dionysia manages, among other paperwork, to cite a previous decision by the prefect Flavius Titianus ordering that the wife should have the final decision,²⁵ as well as another decision by the *epistratēgos* Paconius Felix that explicitly follows Titianus’ decision.²⁶ Thus, non-Roman law may indeed have been regularly upheld, but there was no guarantee of this, and the extent to which Romans did uphold local legal norms still – in many cases – came down to the preference of that particular judge.²⁷

If we move west, the materials for the mix of normative orderings within a Roman court is more scarce. While a good number of contracts have survived, judgments by Roman officials are thinner on the ground and the nature of the evidence with which we are dealing is generally of a different type: less documentary records of petitions, decisions and so forth, and more epigraphic materials, which represent, of course, a direct and deliberate decision on what to memorialize.²⁸ This makes direct

²³ See Claudia Kreuzsaler and Jakub Urbanik, ‘Humanity and Inhumanity of Law: The Case of Dionysia’, 38 *Journal of Juristic Papyrology* (2008), 119 on this rhetoric. It should also be noted that although this is the most famous connection in which this reference is discussed, it is also cited in the papyri relating to other matters (including testamentary freedom, see P. Oxy XLII 3015). Furthermore, given the vast amount of literature on the ‘law of the Egyptians’, we might point out that it was not necessarily so well-known to the Roman officials in Egypt in antiquity: it is referred to in only a limited number of papyri (see n.24 below), and in Dionysia’s case in P. Oxy. II. 237, the matter is referred to the prefect because there has been no prior decision on this matter in particular (col. VII, ll.4-8). Precedent was obviously not well enough known to merit an instance decision, and it is perfectly possible that Dionysia’s father, Chaeremon, had gathered equally compelling precedents that he could use to uphold his rights (which, although we are informed of their existence, do not survive for us).

²⁴ Though references are also made in P. Oxy IV 706, l.7 (=M.Chr 81), 73 CE; P. Oxy XLII 3015, l.3 (post 117 CE); P. Tebt. II. 488, ll.21-27 (post 121-122 CE), CPR I. 18 (=M. Chr. 84), 124 CE.

²⁵ P. Oxy. II. 237, Col. VII, ll.19-29.

²⁶ P. Oxy. II. 237, Col. VII, ll. 29-38.

²⁷ See Czajkowski, *Localized Law*, 166-198 for this position, detailed at greater length.

²⁸ A full survey of the evidence from the West is beyond the bounds of this paper. In terms of the documentary record, the Dacian Tablets are obviously vital. Materials have also recently been unearthed in Britain, some of which include legal documents, and the latest excavations from Vindolanda, once the tablets are published, may add to our data. Most normally we are dealing with contracts (rather than decisions: though from the Bloomberg tablets, WT51 (76 CE) does refer to a case and a fragmentary petition survives among the Vindolanda tablets in Tab. Vindol. II.344). See, for example, among the new Bloomberg tablets, WT 44 and WT 53 (loans); WT 55 is also a loan note, comparable with the Dacian material (e.g. FIRA III. 122 and 123 [=IDR I. 35 and 33]); other tablets have what look like quite precise Roman legal terms: for example, WT35, which includes *dedi arram*, though the form of the document is more epistolary; WT 56 refers to a promise given in good faith (*dari fide promissit*); WT 61 includes a reference to *mutuum*, cf. Tab. Vindol. II.193. The curse tablets from this region also provide little information for consideration: in other areas these will sometimes concern lawsuits, but Britain’s *defixiones* are for the most part against thieves. Little of any of this helps with disputes within the family but does give us some idea of the evidentiary landscape.

comparison challenging. The municipal laws are a rich source for legal ordering in the provinces, and do preserve jurisdictional evidence that will be discussed in the next section. There are also some fascinating glimpses into the problems arising in such communities and Roman attempts to preserve the *status quo*: the *lex Irnitana*, for example, explicitly allows non-Roman patrons rights over (newly-created) Roman citizens, thus preserving a pre-existing power structure in explicit legal terms, in direct opposition (from the Roman viewpoint) to the hierarchy of their respective legal statuses.²⁹ We may also note that this statute states that any matters between *municipes* that are not dealt with in its text are to be transacted according to the Roman *ius civile*.³⁰ The gap thus often filled in the East in practice – as we see it – by provincials wrangling over what legal ordering pertains to their situation,³¹ and bringing forth their own evidence to argue for it, is here very explicitly closed off for these *municipes* in the form of the *ius civile*.

The difference in evidence remains here, and potentially western provincials could argue in court in the same way as their eastern counterparts. But the penalties imposed for ignoring or circumventing the *lex Irnitana* are striking, and while we should assume that other provincials from non-*municipia* elsewhere in the west were perfectly capable of approaching the law with the same sophistication as their eastern counterparts,³² those in the community subject to this statute were not allowed this opportunity. The status of the community is entirely different: this is a *municipium*, not a peregrine community and thus the ideological tie to Rome is closer, the need to mimic the conventions of Rome as a polity more urgent. All this raises an interesting paradox in terms of the freedom to choose between different laws and legal fora for those of different statuses: did *peregrini* have greater flexibility than Latins or Roman citizens? For the moment: higher legal status does not seem to have accorded with greater choice of law.³³

An objection to this would be based on the history of each region: in the west, there were nowhere near the developed legal traditions that we find in the East (especially in many areas with the long tradition of Hellenistic *poleis*). And even if we as modern observers undercut this with appeals to a more fluid, anthropologically orientated idea of what law is, it might still be objected that the key issue is that the Roman view was otherwise: that they saw the west as a barren wasteland of civilization, and thus devoid of law before their advent. Thus there was no space to allow for indigenous legal orderings because, in the Roman mentality, these simply did not exist.

²⁹ *Lex Irnitana* Ch. 97.

³⁰ *Lex Irnitana* Ch. 93.

³¹ See Ari Z. Bryen, 'Judging Empire: Courts and Culture in Rome's Eastern Provinces', 30 *Law and History Review* (2012) 771 on this process.

³² See Kimberley Czajkowski and Benedikt Eckhardt, 'Law, Status and Agency in the Roman Provinces', *Past & Present* 241 (2018), 3.

³³ This is not to say that *privilegium fori* could not be conceived as a privilege: see FIRA I. 73 (= *AE* 1936, 136) for an edict of Vespasian granting doctors and teachers the right to choose in which court they brought suits concerning breaches of the edict.

This does not seem to have been the case. First, Roman elites were capable of seeing the inhabitants of all parts of the empire as barbaric (or not) – the Egyptians, whose legal traditions were indeed upheld (as we have seen above), were hardly viewed in the most positive light by many Roman authors.³⁴ Similarly, the western barbarians could enter Roman elite discourse as *exempla* of order and civilization. Remaining in the broad realm of family law, take, for example, Tacitus's comments in around 98 CE on the marriage customs (*mores*) of the *Germani*:³⁵

Their marital practice, however, is strict, and indeed no part of their manners is more praiseworthy. Almost alone among barbarians they are content with one wife, except a very few among them, and these not from lust, but because their nobility procures for them many marital ties. The wife does not bestow a dowry (*dos*) on the husband, but the husband on the wife. The parents and relatives are present, and pass judgment on the marriage-gifts (*munera*), gifts not procured to suit a woman's taste, nor such as a bride would adorn herself with, but oxen, a bridled horse, a shield, with a spear and a sword. With these presents the wife is espoused, and she herself in her turn brings her husband a gift of arms. This is their strongest bond, these their sacred mysteries, these their nuptial gods. So that the woman should not think herself apart from aspirations of noble deeds and from the perils of war, she is reminded by the ceremonies which inaugurate the marriage that she is her husband's partner in toils and dangers, destined to suffer and to dare with him alike both in peace and in war.

There is much here to appeal to a Roman mentality: a sense of austerity, monogamy (for the most part), an exchange of gifts in the form of a dowry and the involvement of close family and relatives. Even in cases where these barbarians succumb to polygamy, it is done for political/pragmatic reasons, not *libidine*. In their marital practices, then, the *Germani* are to be admired: strict and solemn. This is the most praiseworthy of these foreigners' customs and – it is hinted – should be emulated.

Whether, of course, this bears any relation to the actual marriage practices of the *Germani* at this time is another matter altogether.³⁶ 'The other' serves as an ideal here, and the contrast with Rome is made

³⁴ See, for example, Cicero, *Pro Rab. Post.* 34-36; *BAlex.* 24; though note the cautions of Erich S. Gruen, *Rethinking the Other in Antiquity*, Princeton, 2010, at 74-106, that these characterizations – from the Roman era – often refer to Alexandria rather than Egypt as a whole, for obvious political reasons.

³⁵ Tacitus, *Germania* 18 (translation adapted from Church and Brodribb): *Quamquam severa illic matrimonia, nec ullam morum partem magis laudaveris. Nam prope soli barbarorum singulis uxoribus contenti sunt, exceptis admodum paucis, qui non libidine, sed ob nobilitatem plurimis nuptiis ambiuntur. Dotem non uxor marito, sed uxori maritus offert. Intersunt parentes et propinqui ac munera probant, munera non ad delicias muliebres quaesita nec quibus nova nupta comatur, sed boves et frenatum equum et scutum cum framea gladioque. In haec munera uxor accipitur, atque in vicem ipsa armorum aliquid viro adfert: hoc maximum vinculum, haec arcana sacra, hos coniugales deos arbitrantur. Ne se mulier extra virtutum cogitationes extraque bellorum casus putet, ipsis incipientis matrimonii auspiciis admonetur venire se laborum periculorumque sociam, idem in pace, idem in proelio passuram ausuramque.* Also note the following chapter on the punishments for adultery.

³⁶ To pass over the fact that Tacitus had no first-hand contact with the *Germani*, this is one of those key passages where his moralizing purpose comes directly to the fore: his *Germani* are a model of strictness and chastity to serve as a mirror image to what he perceives as the problem of degeneracy and immorality of imperial Rome.

more stark by the fact that such admirable values are placed in the hands of the *barbari*. Germanic *mores* are better than the Roman ones and the ceremonial aspects of the marriage reinforce these further.³⁷ Whether this is real is irrelevant for Tacitus' purposes of using the barbarians in order to shine a light on Rome's depravity. The point is that the *Germani* do have admirable *mores* in the realm of what we would classify as 'family law': Tacitus may not use *ius* or *lex* in this connection, but given the laudatory tone, and his views elsewhere on *leges*, this is not perhaps intended as denigration.³⁸ Thus while this may be pure imagination, it undercuts the assumption that Roman elites viewed the Western people as entirely without legal custom of their own. In their imagination, these could look more acceptable to Roman norms than that of the Eastern population. There should, therefore, be space for these to persist, be acknowledged and recognized within a Roman court context (and beyond the context of the *municipium* and *colonia*).

To return to our starting point, Ando's approach to legal pluralism therefore in has a wide application. The question is how meaningful the existence of such normative pluralism is, and indeed how deliberate it was. The Roman state of the early and high empire was not the large bureaucratic machine of late antiquity: the framework was in many ways skeletal, the officials not by any means legal experts, and communication of principles and precedents dependent on elite networks and transference. Roman law was not yet codified, and was in this period open to competing ideas and constructions of what it meant.³⁹ This idea of law must in some ways be by default pluralistic: there is little to no practical mechanism by which it could be anything else. To survive and persist as an entity, Roman law – in the sense of the gradually emerging corpus that included and reflected the standards by which magistrates judged within the many Roman courts throughout the empire – had to be expansive, had to become an ideological construct with fluid, changeable and changing legal details.⁴⁰ If Roman law is pluralistic in this period in and of itself, then we might question the extent to which we can meaningfully describe this situation within the Roman court as pluralistic.

Essentially, approaching the empire as legally pluralistic in this way brings us directly up against the 'What is law?' question. This may not ever be answered, but it is a vital factor in determining the extent of legal pluralism in this sense. If Roman law had defined limits, then judging by the law of 'others' in a court constitutes a deliberate decision somewhere along the line to allow for a pluralistic environment. If it is by its nature conceived as more fluid, more wide reaching, then the level of active allowance of

These chapters are also most certainly an indirect reflection on the function and effectiveness of the Augustan marriage laws.

³⁷ Gruen, *Rethinking*, 150-151, proceeds on the basis of a distinct separation between morals and laws, in part because of Tacitus' comment at *Germania* 19: *plusque ibi boni mores valent quam alibi bonae leges*. This holds to a point, but that Tacitus makes the comparison is telling: these fall within the same sphere and – most importantly – are supposed to have the same function in society.

³⁸ And indeed Tacitus' views on legislation are mixed: see *Germania* 19; *Annals* 3.25-27, especially at 27: *iamque non modo in commune sed in singulos homines latae quaestiones, et corruptissima re publica plurimae leges*.

³⁹ Bryen, 'Judging Empire'.

⁴⁰ Czajkowski and Eckhardt, 'Law, Status and Agency'.

pluralism is more limited since this all falls – very broadly – under the ‘Roman law’ sphere in magistrates’ minds. This may be and – I shall concede – is too overarching and too broad a definition. But where on this spectrum we draw the boundary must be determined in order to make any definition of this situation as legally pluralistic meaningful. An urgent question to be considered is therefore what exactly the bounds of Roman law were in the early and high empire.

IV. The Capacity to Forum Shop: The Institutional Set-Up

We then turn to the second approach: i.e. the extent to which litigants could forum shop.⁴¹ Indigenous legal traditions could be appealed to within a Roman court, and perhaps even constructed in a certain way to suit that particular forum; if, however, this is all that exists – i.e. litigants can appeal to indigenous norms within a state forum – then this places severe limits on the extent to which the landscape of the Roman empire really did allow for multiple legal orderings (in addition to some of the more theoretical problems outlined above). Within this picture, the judge and the forum are still a representation of the Roman state:⁴² we are dealing with a multiplicity of laws within a monopoly on jurisdiction. The picture given there is not that of jurisdictional pluralism, and indeed if this were the whole picture, then the ability of litigants to forum shop was nil.

The ideology of the Roman state might certainly present this picture: Rome was, after all, the embodiment of civilization, and the bringing of civil order and law to the barbarians was a part of this.⁴³ Velleius Paterculus’ picture of the *Germani* coming to the Roman commander on the frontier to have their cases heard may indeed show their subversion of the Roman ideology on their part and the undermining of the Roman commander in question,⁴⁴ but it is also a powerful example of the Romans’ own attitude towards their law and others: they bring law and order to populations unfamiliar with it. This is, of course, the stereotype and an exaggerated one at that, which has already (in part) been deconstructed above. It would also cause immense practical problems for Roman officials, with a minimal supporting bureaucracy, to subsume for themselves every matter for decision, the resolution

⁴¹ It should be noted that this approach is not confined to antiquity. See Ido Shahrar, ‘State, Society and the Relations Between Them: Implications for the Study of Legal Pluralism’, 9:2 *Theoretical Inquiries in Law* (2008), 417, at 436: ‘from the point of view of an active individual agent, “strong” legal pluralism exists if he or she may choose to appeal in a particular matter to more than one tribunal or “legal mechanism”.’

⁴² This is not to state that the Roman governor was the only official available to make judgments within, to take the examples used in the last section, Egypt: petitioners could and did take their complaints to local administrators too (for example the *strategos*). But these were subsumed within the Roman state infrastructure: local courts ceased to exist with the Roman conquest. This might have led to a considerable amount of variation in judgments, rules applied etc but within the formal structure these were all ‘state’ officials and judgments.

⁴³ See Caroline Humfress, ‘Law, Bureaucracy and the Practice of Government and Rule’, in Peter Bang, Christopher Bayly, and Walter Scheidel, eds., *The Oxford World History of Empire*, Oxford, forthcoming, Section 4, ‘Legalism from below’ for a wide-ranging overview of this (Western) ideology.

⁴⁴ Velleius 2.118.1; on which see Clifford Ando, ‘Law and the landscape of empire’, in Stéphane Benoist, Anne Daguët-Gagey and Christine Hoët-van Cauwenberghe, eds., *Figures d’empire, fragments de mémoire: pouvoirs et identités dans le monde romain impérial (Ile s. av. n.è.—VIe s. de n.è.)*, Paris, 2011, 25 at 47.

of every single dispute and to disallow all else to the point of actually forbidding it. Thus, the ideology may not match the reality. This is also leaving aside the idea that the Romans' conception of law and order as presented from the imperial standpoint does not necessarily match that of their newly conquered subjects.

But there are also concrete examples of limited jurisdiction being allotted to the judges of particular communities. The municipal laws, mentioned above, are in some ways the encapsulation of Roman imperial ideology: setting up miniature Romes across the West, with regulated institutions and careful apportioning of jurisdiction. To take the example used above, the copy of the Flavian municipal law preserved (in part) in the *lex Irnitana* does allow for some local jurisdiction:⁴⁵ first, there is a limit placed on the private cases between *municipes* and *incolae* that the *duumviri* can hear of 1000 sesterces (with further exceptions);⁴⁶ though they seem to have been able to hear cases over this limit if both parties agreed.⁴⁷ But this is all, of course, in the setting of a Latin *municipium* (with a few Roman citizens and *incolae* about too), i.e. a highly Romanized setting, and we might wonder about the level to which these local institutions also consciously mimicked their higher Roman counterparts. The inclusion of the *incolae* here is telling – we are not simply dealing with citizens of the *municipium*, but the cases are all within its territorial bounds. What happened beyond these is another matter.

Turning east, the level of the governor's interference in local court jurisdictions may have varied. In Egypt, the local jurisdictions from the Ptolemaic era were subsumed into the Roman infrastructure: there was the state system or nothing.⁴⁸ It should of course be noted that these newly 'subsumed' administrative posts were not (for the most part) filled with Romans, but staffed by natives. As such,

⁴⁵ Ernst Metzger, 'Agree to Disagree: Local Jurisdiction in the *lex Irnitana*', in Andrew Burrows, David Johnston, and Reinhard Zimmermann, eds. *Judge and Jurist: Essays in Memory of Lord Rodger of Earlsferry*, Oxford, 2013, 207; Alan Rodger, 'The Jurisdiction of Local Magistrates: Chapter 84 of the *Lex Irnitana*,' 84 *Zeitschrift für Papyrologie und Epigraphik* (1990), 147.

⁴⁶ The exceptions are mostly those which would involve *infamia* if the defendant were condemned; also those which have deliberately been separated in order to avoid the 1000 sesterces limit and certain actions involving *praedudicia* or begun by *praediudicales*.

⁴⁷ The terms of this particular chapter in the *lex Irnitana* have provoked quite some debate, as has the connection with the jurisdiction allowed to aediles: the various editions of the text all have comments on this, and among the extensive literature, Metzger, 'Agree to Disagree'; Armando Torrent, 'Lex Irnitana: cognitio de los magistrados locales en interdictos, y limitación a su competencia por cuantía', 12 *Anuario da Facultade de Dereito da Universidade da Coruña* (2008), 987; Dieter Nörr, 'Lex Irnitana c. 84 IXB 9–10: "neque pro socio aut fiduciae aut mandati quod dolo malo factum esse dicatur"', 124 *Zeitschrift der Savigny-Stiftung Romanistische Abteilung* (2007), 1; G. P. Burton, 'The *Lex Irnitana*, Ch. 84, the Promise of Vadimonium and the Jurisdiction of Proconsul', 46 *Classical Quarterly* (1996), 217; Wilhelm Simshäuser, 'La juridiction municipale à la lumière de la *lex Irnitana*', 67 *Revue historique de droit français et étranger* (1989), 619; Alan Rodgers, 'The Jurisdiction of Local Magistrates: Chapter 84 of the *Lex Irnitana*', 84 *Zeitschrift für Papyrologie und Epigraphik* 84 (1990), 147; and Karl Hackl, 'Der Zivilprozeß des frühen Prinzipats in den Provinzen', *Zeitschrift der Savigny-Stiftung Romanistische Abteilung* 114 (1997), 141 at 151–152, represent a spread of opinions on this particular issue; see Metzger, 'Agree to Disagree', 210, nn.16–18 for further literature. I am inclined to agree with Metzger's recent corrections to the chapter, that suggest that this agreement meant that *duumviri* could also have jurisdiction over the listed exceptions except those cases involving a *praeiudicium de capite libero*: this is less limited than some other interpretations.

⁴⁸ See Alonso, 'The Status of Peregrine Law', 352.

the categorization here is institutional: these officials were part of the state infrastructure, though of course their own training, background and expertise may have fostered the survival of local normative orderings within this context. In Roman Arabia, the Babatha archive presents a picture of the governor acting in ‘splendid isolation’, with little trace of non-Roman institutions.⁴⁹ More generally, local courts did not necessarily have their rights of jurisdiction firmly secured in the *lex provinciae*, where these existed,⁵⁰ but this did not prevent governors from choosing to leave much of the business to the cities themselves, if they so wished.⁵¹ Free cities are then a further matter here, where we would very much expect that the citizens of these settlements could preserve their local traditions.⁵² A further question would be whether these citizens were then able to turn to the Roman jurisdiction instead of their local legal forum. Certainly in some cases, the Romans seem to be able to be brought in as enforcers. Note the appeal to Pliny concerning the feud between Dio Cocceianus and Flavius Archippus, represented by Claudius Eumolpus, in the *boulē* of Prusa,⁵³ which seems a deliberate attempt to avoid a local judgment at Prusa: Eumolpus, who had also explicitly brought in Pliny, then tried to have the case heard by him at Nicaea.⁵⁴ Many of those involved were Roman citizens, which may provide one reason for the appeal to Rome. But the principle of appealing to an outside authority to avoid local jurisdiction is telling and does, indeed, seem to constitute an ability to forum shop.

This for the most part concerns the matter of the extent to which the Roman state allowed or granted jurisdiction to non-Roman fora. But there are typically further spaces of (in-)justice which do not necessarily make it into official cognizance unless they actively seek to do so: village councils, local ‘big men’, religious, social or economic authority figures acting as arbitrators, mediators or even judges

⁴⁹ Hannah M. Cotton and Werner Eck, ‘Roman Officials in Judaea and Arabia and Civil Jurisdiction’, in Ranon Katzoff, and David Schaps, eds. *Law in the Documents of the Judaean Desert*, Leiden, 2005, 23 at 24; the only local institution attested is the *boulē* of Petra (P. Yadin 12). There is no trace at all of ‘local’ courts; see Czajkowski, *Localized Law*, 133-165 for an attempt to trace other possible ways of resolving disputes.

⁵⁰ See Georgy Kantor, ‘Greek Law under the Romans’, in Edward Harris, and Mirko Canevaro, eds. *The Oxford Handbook of Ancient Greek Law*, Oxford, 2015 on the variance of the jurisdictional privileges granted to *poleis*, among a good overview of jurisdictional variance in the East; see also Julien Fournier, *Entre tutelle romaine et autonomie civique: l’administration judiciaire dans les provinces hellénophones de l’Empire romain (129 av. J.-C.–235 apr. J.-C.)*, Athens, 2010, 397–501.

⁵¹ Most famously, see (in the late Republic) Cicero’s comment (*Att.* VI. 1) that he let Greeks adjudicate private suits according to their own laws amongst themselves (*multaque sum secutus Scaevolae, in iis illud in quo sibi libertatem censent Graeci datam, ut Graeci inter se disceptent suis legibus*). But the explicit statement of this means it was not a given: Cicero, indeed, presents it as benevolence on his part.

⁵² Even when this contravened Roman legal regulations: see, for example, Pliny *Epp.* 10.92-93 where Amisus, as a *civitas libera*, may form a benefit society (*erantum habere*; 10.93) but in other cities *quae nostro iure obstrictae sunt* they are strictly forbidden. The Cyrene edicts also allow a considerable amount of autonomy to Greeks and – although these are occasionally cited as wider proof of local autonomy in the empire – these apply primarily to free cities (note too the limits imposed, for example, on Roman citizens being able to act as accusers in murder cases in Edict I: see James H. Oliver, *Greek Constitutions of Early Roman Emperors*, Philadelphia, 1989 no.8 for the text with English translation and commentary).

⁵³ Pliny, *Ep.* X. 81.

⁵⁴ Indeed, Eumolpus seems to have wanted to lock horns with Dio but on no account at Prusa (which was indeed Dio’s hometown, and he seems to have had some standing there), thus selecting a different forum where he would (hopefully) gain a more favourable hearing.

and enforcers.⁵⁵ When dealing with antiquity, any ‘court’ or form of dispute resolution that is not explicitly sanctioned by the state may be less likely to leave a trace. The probability of a written record of some sort might increase the more elite the group we deal with,⁵⁶ but for the majority – the economically poor perhaps – unless, for example, their dispute was brought before a Roman forum, it would be unlikely to leave a record. If it were resolved through negotiation or mediation or local ‘unofficial’ forms of adjudication, and potentially judged based on tradition in that village as it had been carried out for decades or centuries, it would vanish. Thus one of the key contexts in which – in modern, post-colonial contexts in particular – we find potential for forum shopping, remains for the most part in antiquity in the dark.

Yet in antiquity as in modernity, disputes within the family are particularly vulnerable to resolution through various ‘unofficial’ forms. The point at which we typically learn of them is when they reach a Roman court or state official: here, we may get part of the back-story (especially if it involves other official channels), but this is in general a very partial window. The following section will constitute a first step in assessing whether we can indeed trace other forms of dispute resolution within the family and whether and how these relate to the extent of normative / jurisdictional pluralism within antiquity.⁵⁸

V. Beyond the Law

The above has set out a broader landscape of what we might expect in institutional terms within the Roman empire, but where do disputes within a family context fall in all this? Those relating to marriage and divorce provide a useful focus, both in view of the concerns of this volume, but also as they offer a good case study for possible non-state (or beyond the state) legal orderings: these were private legal transactions that – unless problems arose – would have no need to come to the state’s attention.⁵⁹

⁵⁵ This is an area still under-studied as ‘dispute resolution’ in the Roman world: for an example of what may be done for Ancient Greece, see Sara Forsdyke, ‘Street Theatre and Popular Justice in Ancient Greece: Shaming, Stoning and Starving Offenders Inside and Outside The Courts’, 201 *Past & Present* (2008), 3; Torrey Seland, *Establishment Violence in Philo and Luke: A Study of Non-Conformity to the Torah and Jewish Vigilante Reactions*, Leiden, 1995 also leans in this direction in his studies on Luke and Philo. The most obvious place to look for mediation, arbitration and local judges is in some ways the rabbinic material, but this is highly problematic to take as a description of reality and is redacted later than the principal time period under consideration here. See n.57 for further bibliography on late antiquity.

⁵⁶ It might work its way into historical accounts, or indeed the increased economic wealth involved made documentation of the agreement more likely as a safeguard.

⁵⁸ Ari Z. Bryen, *Violence in Roman Egypt: A Study in Legal Interpretation*, Pennsylvania, 2013, 142-143) does include this into his definition of ‘strong legal pluralism’ (taken from John Griffiths, ‘What is Legal Pluralism?’ 26 *Journal of Legal Pluralism and Unofficial Law* (1984), 1), though assumes as a given that such ‘informal’ methods (‘ranging from shaming and moral censure ... to brute violence against transgressors of the normative order’) existed, then focussing primarily on the implications for the (multiple) sources of law in Roman Egypt. While I am sympathetic to this, from the more institutional perspective the conclusion of these alternative venues needs further interrogation.

⁵⁹ The Augustan marriage legislation does represent an (unusual) direct state interference in marriages between those of different statuses, but this was geared towards a small circle of the Roman elite, not *peregrini* throughout the empire.

Furthermore, it is beyond doubt that this is an area where a multiplicity of legal traditions survived.⁶⁰ It is, however, a different matter then to identify a range of available fora.⁶¹

Some disputes, possibly those that were the most entrenched, most vitriolic, least likely to be settled by other methods, certainly came to a Roman court or a Roman sanctioned official.⁶² In Egypt, from which most of our evidence derives, this was most often the *stratēgoi* in the Roman period: primarily drawn from the regional population, they served in this state administrative post. The disputes brought to them would then be subject to the concerns that fell under the first category in this paper: normative traditions within a state setting.⁶³ In this, as we have seen, litigants could and did appeal to local norms and could be successful in their claims (though were not guaranteed to be so): the request in P. Oxy. II. 281 for a repayment of the dowry plus an extra 50% by a certain Syra, for example, is certainly a local practice, and Syra here turns to the *archidikastēs* to have it enforced.⁶⁴ This seems to have been imposed as a

⁶⁰ We have, for example, a good sample (over one hundred) of marriage contracts from Egypt and the Near East in the early to high imperial era, which take a variety of forms (see Uri Yiftach, *Marriage and marital arrangements: a history of the Greek marriage document in Egypt, 4th century BCE - 4th century CE*, Munich, 2003, on the possibility that there may have been different regional traditions in Egypt). These include different forms of Greek contract (*homologia*, for example BGU IV 1052 (= *Sel. Pap.* 1.3) from Alexandria in 13 BCE; *ekdosis*, see P. Oxy. III. 496 (127 CE, Oxyrhynchos), often thought to be more common in Oxyrhynchos than elsewhere in the Roman era, although see also P. Yadin 18, 128 CE from Roman Arabia); alimentary contracts (see, for example, the abstracts on the *recto* of P. Mich. II. 121, Tebtynis, 42 CE); Latin contracts (from Roman citizens, see, for example, P. Mich. VII. 434 + P. Ryl. IV. 612, c. 2nd century). Elsewhere, in the Near East, we also have Aramaic contracts, see P. Yadin 10 from Roman Arabia, c. 125 CE. 'Deeds of Divorce' also attest various practices (see n.68 below for bibliography).

⁶¹ See Ilias Arnaoutoglou, 'Marital Disputes in Greco-Roman Egypt', 25 *Journal for Juristic Papyrology* (1995), 11 for an excellent assemblage of the papyrological material and the disputes therein.

⁶² Based on the idea that one would not take the time and expense of turning to a Roman forum unless all other methods were exhausted, a settlement could not be reached otherwise, or the dispute had become so intractable that it was hoped that recourse to the Romans would at least give an added stimulus towards settlement. This should not be taken as a return to the typology of Deborah W. Hobson, 'The Impact of Law on Village Life in Roman Egypt', in Baruch Halpern and Deborah W. Hobson, eds., *Politics, Law and Society in the Ancient Mediterranean World*, Sheffield, 2003, 193, whereby this is the last resort: it is perfectly possible that litigants used the recourse to the Roman court simultaneously with other bargaining methods, on which see Benjamin Kelly, *Petitions, Litigation, and Social Control in Roman Egypt*. Oxford, 2001, 285. In the Roman era before the CA, petitions to officials that concern disputes between spouses (or ex-spouses) include: P. Oxy. II. 315 (37 CE), the petition of Tryphon complaining about an assault by his ex-wife Demetrous and her mother on his current wife, Saraeus; P. Mich. V. 227 (c. 47 CE), is a fragmentary petition to the strategos of the Arsinoite nome that mentions an argument between a husband and wife; P. Oxy II.281 (20-50 CE), a petition to the *archidikastēs* from Syra, complaining of desertion and attempting to reclaim the dowry plus half more; SB XVI 12627 (127/8 CE), the beginning of a complaint by a husband that mentions a former wife and a dowry; PSI V.463 (158-160 CE) is from a wife against her former husband concerns the removal of household objects; PSI X. 1104 (175 CE) is a further complaint by a wife; P. Heid. III.237 (2nd century CE), a complaint about a wife who had absconded with much of the husband's property; P. Tebt. II. 334 (200-201 CE) is from a wife accusing her husband of absconding with the dowry; P. Coll. Youtie I.24 (121/122 CE) differs slightly as it concerns the repayment of a dowry by the brother-in-law to the wife after the husband's death.

⁶³ Though of course with the added complication that the official in question was a 'native': this in turn might foster greater normative pluralism within the state system, as they made decisions based on their own expertise.

⁶⁴ Likely because the marriage contract was a *συγχώρησις*; on his jurisdiction, see Arnaoutoglou, 'Marital Disputes', 26, n.27; Anna Calabi, 'L' *ἀρχιδικαστής* nei primi tre secoli della dominazione romana', 32 *Aegyptus* (1952), 406 and Rafał Taubenschlag, *The Law of Greco-Roman Egypt in the Light of the Papyri*, 2nd edition, Warsaw, 1955, 489, n.64.

penalty in marriage contracts when the husband had not returned the dowry within a specific time,⁶⁵ suggesting that Syra had turned to the *archidikastēs* after some delay (in which her husband had not repaid her). She thus here follows a fairly regular pattern of turning to a state official as an enforcer of a local norm.

But in all likelihood a very small segment of the number of disputes that occurred reached state attention. This might either have been a deliberate choice (settling by other means) or necessity (a Roman court would be an expensive option that not all would be able to access). In some, for example, we see the petitioners are explicitly using this as a last resort. To take P. Heid. III. 237 from the 2nd century CE, from a petitioner whose name is lost: he complains his wife has left with a good amount of his property (items of which are described in detail), and did not react even though he had repeatedly contacted her about them (ll.14-16); it is only after he had learned that she had remarried that he petitioned a centurion.⁶⁶ Though fragmentary, the petition here makes quite clear that we in fact only learn of this dispute because other methods had failed: this would otherwise have remained completely outside the cognizance of the officials and come nowhere near the Roman court. There is no extra forum, but other methods to resolve family (or ex-family) conflict are very clear.

If we take the issue of divorce further – and so disputes that either led to the dissolution of the marriage, or arose as part of the settlement process – we may say that there were some sensational divorce disputes that did indeed end up before a Roman magistrate in antiquity.⁶⁷ But there were also a large number that did not: we have examples of just over 50 so-called ‘deeds of divorce’, which represent settlements as the result of ends of the marriage.⁶⁸ Typically the matter of concern is to record the return of the dowry and safeguard against bringing any future claims. These therefore mean that a) divorces of anyone without means would be unlikely to leave a trace (no documentation was needed to make the divorce ‘legal’ in the early empire, and so such receipts would only be needed if there was money to sort out); b) these constitute private settlements, which may legitimately be considered another means of settling a dispute or avoiding a future one. Here, the only outside influence may have been the writer of the contract, though we may note that many of these receipts also involve various members of the family who seem to have been involved in the dispute resolution process.⁶⁹ The parties therefore use

⁶⁵ These are typically called ἡμιολία clauses, and appear in several Greek language marriage contracts from Egypt from both the Ptolemaic and Roman era: see M. Chr. 284 (second century BCE), BGU IV. 1050 (=M. Chr 286) (12-11 BCE) and P. Oxy. III. 496 (=M. Chr. 287) (127 CE).

⁶⁶ See also P. Oxy. II. 282 (29-37 CE) for a similar fragmentary complaint about a wife absconding with property.

⁶⁷ Particularly sensational is a much later (4th to 5th century) papyrus, that details a far from happy home life at length (P. Oxy. L. 3581). See Arnaoutoglou, ‘Marital Disputes’, 22-24 for a very good overview of such disputes.

⁶⁸ See Jakub Urbanik, ‘Divorce’ in Keenan, Manning and Yiftach-Firanko, *Law and Legal Practice*, 154 on these documents and divorce more generally; see also Hans-Albert Rupprecht, *Studien zur Quittung im Recht der Graeco-Ägyptischen Papyri*, Munich, 1971, 43-51 and J. Lesquier, ‘Les actes de divorce gréco-égyptiens. Étude de formulaire’, 30:1 *Revue de Philologie de Littérature et D’Histoire Anciennes* (1906), 5 for older treatments of the documents.

⁶⁹ See P. Mil. Vogl. III. 185 (=SB VI. 9381) (139 CE), which involves the wife, her mother, her father (acting as guardian for both women), the husband and his father: the four (presumably excluding the father acting as

other means – including informal negotiations and arrangements within the families – to come to a settlement. None of these modes of resolution have anything to do with a Roman legal forum, except to try to avoid recourse to it later, and to a certain extent the parties involved were free to come to whatever arrangements they pleased. There could be constraints on this freedom – stipulations in the marriage contract, previous contracts concerning the dowry, a general expectation on what one might obtain if they did go to court or a state official – but the flexibility remained.

Of course the distinction between state and non-state is not so clear-cut, and the manner in which the private settlements and the ‘informal’ methods of resolution interacted with state-sanctioned legal fora is key. This is, indeed, in some ways in the nature of what Mnookin and Kornhauser termed ‘bargaining in the shadow of the law’.⁷⁰ The parties could for example choose to turn to an official to ratify an agreement. P. Oxy II. 268, for example, addressed to the *archidikastēs*, records an agreement in which Ammonarion and her daughter Ophelous agreed to accept a sum of money in lieu of Ammonarion’s dowry and her daughter’s inheritance from the father’s (Herakles) property from Antiphanes. From what we can tell this was an entirely private arrangement, in accordance or reasoned out from laws governing inheritance in Egypt and the wife’s right to the dowry: we learn of it only because the parties decided to record it with the *archidikastēs*, who otherwise seems to have had no role to play in reaching the settlement. The registration may have been due to the increasing use of documents by the state (thus representing a trickle-down effect).

The impression we receive, however, is that in the realm of marriage and divorce, and disputes arising from them, there was little ability officially to ‘forum shop’, and there is little evidence of jurisdictional pluralism as allowed for by the ruling power. What we find instead is a general tendency to avoid ‘official’ legal fora altogether unless trying to enforce repayment of a dowry or reclaim property (and there, it often seems that other means have failed). Legal pluralism may therefore have been preserved in the ancient world – in the institutional, ‘forum shopping’ sense – not primarily through the active sanctioning or recognition of alternative jurisdictions by the state but by the shadowing of the courts, by the existence of alternative legal venues and informal methods of dispute resolution.

The close relation of these activities to ‘bargaining in the shadow of the law’⁷¹ – methods by which agents attempt to avoid judgment by official courts, or bargain alongside them – has already been mentioned. But these modes of resolving disputes also fall broadly under the sphere of Alternative Dispute Resolution (ADR), and have long been a staple of a certain strand of scholarship on ‘legal

guardian) all agree to the terms, suggesting they were all active parties in the contract. See also P. Fouad. I. 34 (70s CE) and P. Lips 27 (=M. Chr. 293) (123 CE) for two other divorce settlements that involve multiple parties.

⁷⁰ Robert H. Mnookin and Lewis Kornhauser, ‘Bargaining in the Shadow of the Law: The Case of Divorce’, 88 *The Yale Law Journal* (1979), 950.

⁷¹ This often used phrase is taken from Mnookin and Kornhauser, ‘Bargaining’; this concerns negotiation tactics in modern divorce cases, the large majority of which are settled before reaching court. See Becky Batagol and Thea Brown, *Bargaining in the Shadow of the Law: The Case of Family Mediation*, The Federation Press, for an updated perspective, that takes the Australian situation as its focus.

pluralism': ADR mechanisms are acknowledged to be one of the key means in which legal pluralism thrives.⁷² ADR is defined in fairly broad terms: while policy definitions often focus upon the assistance of a neutral third party to allow disputants to come to a compromise (i.e. most normally arbitration and mediation), anthropological definitions that go beyond modern western state contexts are much more wide-ranging. One foundational study, for example, includes 'gossip, fear of ostracism, dependence on others for economic assistance and political support, and mediation by village leaders.'⁷³ Even those activities that fall under this wide-ranging definition of ADR have, however, garnered less attention in studies of antique legal pluralism than in modern counterparts, despite their vital role in the latter.⁷⁴ The problem of evidence mentioned in the previous section provides good, even justified, explanation for this, and yet the kinds of activities we see in the realm of marriage and divorce provide grounds for supposing a large role for ADR in antiquity.

If the 'informal' methods of resolving disputes were the way in which indigenous legal orderings in particular thrived, and these could indeed expand to, for example, mediation or decisions by village or religious leaders,⁷⁵ then we are stepping back from what was the key advance in using 'legal pluralism' to redescribe the antique situation (i.e. undermining the idea of law as just state law) if we then do not classify these as forms of legal fora. We do so because we are explicitly replicating the state perspective: only state recognized courts may be labelled as legal fora, and thus enter into considerations of forum shopping. This is a perfectly legitimate methodological and categorical choice, but it stands in stark contrast to many of the other tenets held in studies of legal pluralism. It also then raises certain urgent questions concerning the perspectives we adopt and where we draw our conceptual boundaries.

VI. Conclusion

⁷² Most recently, see the concise formulation by Geoffrey Swenson, 'Legal Pluralism in Theory and Practice', 20 *International Studies Review* (2018) 438 at 438-439.

⁷³ See Sally Engle Merry, 'Anthropology and the Study of Alternative Dispute Resolution', 34 *Journal of Legal Education* (1984), 277.

⁷⁴ See, for example, one of the foundational articles Sally Engle Merry, 'Legal Pluralism', 22 *Law & Society Review* (1988), 869 at 881; on the ancient side, Traianos Gagos and Peter van Minnen, *Settling a Dispute: Toward a Legal Anthropology of Late Antique Egypt*, Michigan, 1995 give a foundation of what might be done in late antiquity, when mediation and arbitration (and indeed more formalized manifestations of these) become much more widely attested than court litigation; Jill Harries, *Law and Empire in Late Antiquity*. Cambridge, 1999, 175-190 has also tackled out-of-court settlement in this later period. Otherwise a general study of antique ADR is lacking.

⁷⁵ *CTh* 2.1.10 (= *CJ* 1.9.8), a constitution from Arcadius in which the decisions by the patriarch and Jewish courts are brought under the umbrella of the Roman legal system represents a point at which such tribunals come into official recognition: see Jill Harries, 'Creating Legal Space: Settling Disputes in the Roman Empire.', in Catherine Hezser, ed. *Rabbinic Law in Its Roman and Near Eastern Context*, Mohr Siebeck, 2003, 63 on this constitution. Such tribunals certainly did not spring into existence overnight and constitute precisely the kind of "unofficial" legal fora that might have been available to litigants; the question (from a modern perspective of categorization) is then whether we see the existence of such tribunals as constituting the ability to forum shop.

Different manners of studying a subject do not necessarily pose a problem, but when underlying this there is also a different conception of the matter at hand, these may need defining further. We have begun to reach that point in the study of 'legal pluralism' in the Roman Empire, when we need to define more carefully what this entails in antiquity, and more precisely where we reach the ends of both this theoretical construct and its existence in the ancient world.

The two key approaches examined here both open up new problems that will need to be tackled in order to push the subject further. Both are, in some senses, conceptual: if we look purely at pluralism of norms within a Roman 'state' court, we end up coming square up again the 'What is law?' question. This is particularly acute as a problem for the early to high empire, the period before codification. If, indeed, we also adopt more recent definitions of Roman law as still in the process of being determined, as still in many ways a construct in this era, then this perhaps undermines the extent of 'pluralism' in this sense: Roman law could, to a degree, be viewed as rather inclusive, pluralistic by its very nature; the existence of 'legal pluralism' in the sense of 'other' laws then begins to look less certain. This is certainly too expansive a view, but the problem remains.

The 'institutional' approach also raises further questions that need definition in the terms of 'family law' in particular. We can see clear cases where Rome delegated authority to local courts, often with limits as to value or type of case, but space and *iurisdictio* is allotted nonetheless. Most clearly, we see this for free cities and indeed in delegation of authority to local magistrates within *municipia*, though in both cases questions have been raised as to the extent of pluralism this then entailed. If we fully factor in 'bargaining in the shadow of the law' and ADR, which it has been suggested were likely prime candidates for dispute resolution for family disputes, then the range of fora available from which to shop may have been greater. The normal lack of necessity for either formal legal process in order to make a divorce valid, as well as family pressures, and the close connection of the participants all increase the likelihood of this. Thus it is highly probable that this atmosphere created a multiplicity of potential methods for resolving disputes beyond those recognized by the state.

The question is whether this constitutes jurisdictional pluralism of any kind. From the viewpoint of the Roman state, the answer is a clear 'no' – these alternatives were not officially recognized, not granted *iurisdictio*. From a modern perspective, this may not be so clear cut: if the alternative methods were the norm, the manner in which many local traditions were preserved, and indeed if the provincials themselves saw these as either viable alternatives or first options, this could be said to constitute a type of 'jurisdictional' pluralism. We must then decide whether this is pushing the case too far. We can certainly state that for the sphere of marriage and divorce, there was limited ability to forum shop for participants between officially recognized courts, but that this did not lead to the death of non-Roman forms of marriage, nor indeed to a dearth of methods of dispute resolution. Indeed, the majority of

resolutions probably remained beyond the state. This is where we may need to tighten our categories and think through the labels we impose more closely: in a legally pluralistic ancient world where do informal, alternative methods of dispute resolution fit, particularly when it was partially through these that non-state normative orderings survived and even thrived?